



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2022-0381; FRL-9249-03-OAR]

RIN 2060-AV62

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting; Withdrawal of Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; withdrawal.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is withdrawing the proposed rule titled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting” that published in the *Federal Register* on May 3, 2024. Based on comments received, the EPA has determined that there is insufficient justification for the proposed rule revisions to the New Source Review (NSR) program applicability provisions under the Clean Air Act (CAA) and that the proposed revisions could result in unnecessary additional burden on regulated entities and State, Tribal, and local air agencies that implement the NSR regulations.

DATES: As of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the proposed rule published on May 3, 2024, at 89 FR 36870, is withdrawn.

ADDRESSES: The EPA has established a docket for the Project Emissions Accounting rulemaking under Docket ID No. EPA-HQ-OAR-2022-0381. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available electronically through

<https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Jessica Montanez, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Post Office Box 12055, Research Triangle Park, NC 27711; telephone number: (919)-541-3407; email address: *montanez.jessica@epa.gov*.

SUPPLEMENTARY INFORMATION: As established under CAA, the NSR program is a preconstruction permitting program that requires certain stationary sources of air pollution to obtain permits prior to beginning construction. The NSR permitting program applies to both new construction and to modifications of existing sources, regardless of whether the source is in an area where the national ambient air quality standards (NAAQS) have been exceeded (nonattainment area) or if the source is in an area where the NAAQS have not been exceeded (attainment or unclassifiable area). NSR permits for major sources that are located in attainment or unclassifiable areas are referred to as Prevention of Significant Deterioration (PSD) permits. NSR permits for major sources located in nonattainment areas and that emit pollutants above the specified thresholds for which the area is in nonattainment are referred to as Nonattainment NSR (NNSR) permits. An existing major stationary source triggers major NSR permitting requirements when it undergoes a “major modification.” The EPA’s implementing regulations for NSR establish a two-step process for determining major NSR applicability for projects at stationary sources. To be subject to major NSR requirements, the project must result in both (1) a significant emissions increase from the project (the determination of which is called “Step 1” of the NSR applicability analysis); and (2) a significant net emissions increase at the stationary source, taking account of emission increases and emission decreases attributable to other projects undertaken at the stationary source within a specific time frame (called “Step 2” of the NSR applicability analysis, or “contemporaneous netting”). Thus, a project is a major modification for a regulated NSR pollutant if it results in both a significant emissions increase and a significant

net emissions increase for that pollutant across the stationary source.

On November 24, 2020, the EPA published a final rule titled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting” (85 FR 74890) (“Project Emissions Accounting rule”). The Project Emissions Accounting rule made clarifying revisions to the applicability procedures in the EPA’s NSR regulations that are used to determine whether a physical change or change in the method of operation (i.e., a “project”) at an existing major stationary source will result in a significant emissions increase under Step 1 of the NSR applicability process. Specifically, the revisions made clear that both increases and decreases resulting from a project shall be accounted for under Step 1 of the NSR applicability process, consistent with an earlier EPA memorandum that interpreted the pre-existing regulations to allow for the same approach (termed “project emissions accounting”).¹ The EPA determined that a full accounting of emissions changes resulting from a project is more consistent with the definition of “modification” at CAA section 111(a)(4) because it ensures that projects that result in an overall decrease in emissions or in a *de minimis* increase in emissions will not be subject to the major NSR program.

The EPA received a petition for reconsideration on the Project Emissions Accounting rule dated January 22, 2021 (“2021 petition”),² which the EPA denied on the grounds that the petition did not meet the CAA section 307(d)(7)(b) criteria for mandatory reconsideration. However, the EPA decided to undertake a discretionary rulemaking in response to the 2021 petition. As a result, the EPA issued a proposed rule that was published in the *Federal Register*

¹ Memorandum from E. Scott Pruitt, to Regional Administrators, “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program,” March 13, 2018. Available at: https://www.epa.gov/sites/production/files/2018-03/documents/nsr_memo_03-13-2018.pdf.

² Letter from Sanjay Narayan *et al.*, to Acting Administrator Jane Nishida, “Re: Petition for Reconsideration of ‘Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,’ 85 FR 74890 (November 24, 2020), Docket ID No. EPA–HQ–OAR–2018–0048 and for Withdrawal of Guidance Memorandum titled ‘Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program’ (March 13, 2018) (OAQPS–2020–683 and OAQPS–2020–223),” January 22, 2021, (“Petition for Reconsideration”), available at: https://www.epa.gov/system/files/documents/2021-10/final-nsr-accounting-rulereconsideration-petition-1_22_21.pdf.

on May 3, 2024.³ The proposed rule included a potential revision to the definition of “project” in the NSR regulations, additional recordkeeping and reporting requirements applicable to minor modifications at existing major stationary sources, and a potential requirement that decreases accounted for under the Step 1 significant emissions increase calculation be enforceable. The EPA provided a 60-day public comment period on the proposed rule that closed on July 2, 2024.

Based on a careful review of the proposed rule and comments received during the public notice period, the EPA has determined that the proposed rule did not provide sufficient justification of the benefits of the proposed revisions to the NSR regulations, and that the proposed revisions could result in additional burdens on regulated entities and State, Tribal, and local air agencies that implement the NSR regulations, which are not necessary to achieve the intended result. These burdens could disincentivize or delay environmentally and economically beneficial projects at stationary sources, including efficiency improvements.

The stated goal of the proposed rule was to improve implementation and strengthen enforceability of the NSR program provisions finalized in the 2020 Project Emissions Accounting rule. However, based on feedback the EPA received during the public comment process, the EPA agrees with several commenters that the changes the EPA proposed would impose additional burdens and uncertainty on regulated stationary sources without clear and justifiable corresponding benefits.

For the proposed definition of “project,” the Agency proposed to codify in the NSR regulations the EPA’s interpretation and policy for determining whether changes at a facility should be grouped together or separated, as articulated in EPA’s 2018 final action on “project aggregation.”⁴ The EPA explained in the proposal that this change was intended to provide greater clarity as to the types of activities to be included in a single project and to address

³ “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting.” 89 FR 36870 (May 3, 2024).

⁴ Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR); Aggregation; Reconsideration, 83 FR 57324 (November 15, 2018).

concerns of over- or under-aggregation in determining the scope of a project. However, after considering comments, the EPA agrees with State and industry commenters that the proposed definition of “project” could in fact lead to more uncertainty in permitting decisions rather than improve clarity and that there is insufficient evidence to show that aggregation concerns warrant making these changes to the NSR program. The EPA agrees with these commenters that this proposed definition could increase uncertainty by requiring State, Tribal, and local permitting authorities to use as controlling criteria terms like “substantially related,” “economic viability,” and “technical viability,” which were not defined in the proposed rule. Introducing these terms into the definition of “project” without further defining these terms may lead to inconsistent air permitting implementation results if different permitting authorities interpret these terms differently. In addition, the proposed rule did not include sufficient consideration and information on this issue to allow this issue to be fully addressed in public comments and resolved in a final rule.

Regarding aggregation concerns, commenters rightly observed that the EPA has not identified examples of over- or under-aggregation in prior permitting decisions, and that any issues of this nature that do arise can be handled through enforcement of existing NSR regulations. On top of these concerns, the EPA was not able to quantify any benefits from the proposed revisions to the “project” definition. After considering comments on the proposed rule, the EPA has been persuaded by commenters that the 2018 final action on project aggregation provides sufficient guidance on how individual projects should be considered, while maintaining needed flexibility for permitting authorities and regulated sources to consider the particular facts on a case-by-case basis.

The EPA also agrees with similar concerns raised in comments on the proposed clarification of monitoring, recordkeeping and reporting requirements. The commenters noted that these proposed revisions to the monitoring, recordkeeping and reporting requirements could unnecessarily burden the permitting process and associated obligations without corresponding

benefits. In the proposal, the EPA noted that the changes to monitoring, recordkeeping and reporting requirements were intended to clarify and strengthen existing requirements to provide increased transparency, and that in proposing these changes, the EPA sought to analyze the trade-off between compliance improvement with the burdens of additional data collection. Upon further consideration, the EPA agrees with commenters that the additional data collection burden on regulated entities outweighs theoretical benefits of increased transparency from additional reporting. As commenters correctly noted, the EPA did not provide examples or empirical evidence of insufficient recordkeeping, reporting, or monitoring to support these proposed changes, yet the proposed changes would have required additional, and in some instances redundant, data collection burdens on regulated sources.

Regarding the EPA's proposal to make decreases in emissions accounted for in the Step 1 significant emissions increase calculation enforceable, commenters demonstrated that the rationale for this part of the proposal is inconsistent with the EPA's rationale (reflected in prior NSR rulemakings) for other provisions in the EPA's NSR regulations, and that implementation of this part of the proposal would restrict source operation for projects that involve projected decreases in emissions. In a 2002 final rule that reformed the major NSR program applicability provisions, the EPA determined that projected actual emissions should not be made enforceable through a permitting action, finding that doing so "may place an unmanageable resource burden on reviewing authorities" and that "the Act provides ample authority to enforce the major NSR requirements."⁵ This same reasoning applies regardless whether a projection results in an increase or decrease in emissions, and the EPA did not receive any comments on the proposal that provided a compelling basis for requiring an enforceable limitation in one instance but not the other.

Furthermore, the EPA agrees with commenters that, in some cases, requiring enforcement

⁵ 67 FR 80186, at 80204 (December 31, 2002).

of a projected decrease in emissions from baseline levels can restrict operating flexibility and future project opportunities. This may be particularly true for projects that improve efficiency, which discourages source owners from pursuing environmentally and economically beneficial projects. Based on the foregoing, the EPA is withdrawing the proposed rule and does not plan to take further action at this time on the project emissions accounting provisions in the NSR regulations.

Lee Zeldin,
Administrator.